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No. 89-478

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

STATE OF MARYLAND,

Petitioner,

vs.

SANDRA ANN CRAIG,

Respondent.

On Writ of Certiorari to the Court of Appeals of Maryland

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Where individualized findings regarding the need to protect child witnesses are made and the witnesses, ages four to seven, are subjected to cross-examination at trial, does the Sixth Amendment's Confrontation Clause require a face-to-face meeting between the witnesses and the accused before a one-way closed-circuit television procedure may be invoked?

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BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF AMICUS

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest.

1. CJLF has received written consent of the parties to file this brief.

CJLF seeks to bring the constitutional protections of the accused into balance with the right of victims and of society to a fair, swift, orderly system of justice.

The decision of the Maryland Court of Appeals in the present case prevents the state from taking measures to lessen the trauma to a molested child of having to face his molester in open court. The Maryland Court used the Sixth Amendment's Confrontation Clause to force the molested child to confront his accused molester before the state could take measures to lessen the trauma of an in-court confrontation. This unnecessary expansion of defendant's right to confrontation at the expense of the victim is contrary to the rights of victims and society which CJLF was formed to advance.

SUMMARY OF FACTS AND CASE

On October 16, 1986, Respondent Sandra Ann Craig, the operator of a preschool in Howard County, Maryland, was indicted for child abuse, first and second degree sexual offenses, assault, perverted sexual practice and battery. Petition for Writ of Certiorari ("Pet."), at 4. The victim named in each count was Brooke Etze, who attended Craig's preschool from August 1984 to June 1986. *Ibid.*

Several months before Craig's trial, Maryland moved to have four children testify at trial over one-way closed-circuit television. *Ibid.* The statute used to support this motion, section 9-102 of the Courts and Judicial Proceedings Article of the Maryland Code, requires that a judge first find "that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate," Md. Cts. & Jud. Proc. Code Ann. § 9-102(a)(1)(ii), before letting the child testify over television. Maryland invoked this statute to protect Brooke, then seven years old, and three younger children who allegedly

had been abused by Craig and were expected to be called as witnesses at Craig's trial. Pet. at 4.

A pretrial hearing was held on Maryland's motion to use closed-circuit television. *Id.*, at 5. At the hearing, experts gave detailed testimony regarding the trauma each of the four children would suffer if forced to testify in front of defendant at trial. *Ibid.* Craig was present at the hearing, and her counsel cross-examined each expert witness. *Ibid.*

The trial court found that section 9-102's predicate showings had been made regarding each child. *Ibid.* The trial court rejected defendant's Sixth Amendment Confrontation Clause claim. *Ibid.*

The trial commenced on March 16, 1987. *Id.*, at 9. Each child testified under the same procedure. Craig and one of her two counsel remained in the courtroom with an Assistant State's Attorney while Craig's other counsel and another State's Attorney were in the judge's chambers with the child witness and a technician. *Ibid.* Craig and defense counsel in the courtroom could communicate privately with her counsel in chambers by telephone. Testimony was broadcast into the courtroom over audio visual monitors. Each child was cross-examined by the defense. *Ibid.*

Each child testified that defendant sexually abused them. *Ibid.* This testimony was corroborated by medical evidence. On April 2, 1987, the jury found defendant guilty on all four counts. *Ibid.* On September 21, 1987, the court sentenced defendant to ten years imprisonment for the various charges. *Id.*, at 11.

The Maryland intermediate appellate court affirmed the judgment. Petition for Writ of Certiorari, Appendix ("App."), at 22a-69a. If found that, given the trauma each child would suffer if brought face-to-face with Craig, the lack of a face-to-

face meeting did not violate the Sixth Amendment. *Id.*, at 56a-58a.

The Court of Appeals of Maryland reversed the convictions. *Craig* v. *State*, 560 A. 2d 1120 (1989). The Maryland court had previously given section 9-102 a narrow construction in *Wildermuth* v. *State*, 530 A. 2d 275 (1987), requiring personal questioning of the child by the judge in most cases. *Id.*, at 289. The court in the present case interpreted *Coy* v. *Iowa*, 487 U. S. ___, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988) to require even further narrowing, *Craig*, 560 A. 2d, at 1125, and added a requirement that the questioning of the child be done *in the defendant's presence*. *Id.*, at 1127. The court reversed the conviction, looking specifically to *Coy* for the showing needed to invoke the statutory procedure. *Id.*, at 1121.

SUMMARY OF ARGUMENT

The actions of the trial court did not violate defendant's right to confrontation under the Confrontation Clause of the Sixth Amendment as applied to the States by the Due Process Clause of the Fourteenth Amendment. This Court should adopt the reasoning of the plurality in *Pennsylvania* v. *Ritchie*, 480 U. S. 39, 52 (1987) that the Confrontation Clause does not apply to pretrial procedures.

Requiring the child to testify pretrial to justify televising his testimony would endanger the child protection schemes of many states and force vulnerable children to undergo precisely the harmful experience these procedures are designed to avoid. Currently no other state requires a child to confront defendant before having his trial testimony televised. Adoption of the result reached by the Maryland Court of Appeals would frustrate the states' efforts.

ARGUMENT

I. The Sixth Amendment right to confrontation is a trial right.

"In all criminal prosecutions, the accused shall . . . be confronted with the witnesses against him." U. S. Const. amend. VI.

By extending the Confrontation Clause to a pretrial hearing to determine whether a child is entitled to testify over closed-circuit television in a child abuse prosecution, Maryland's Court of Appeals takes the Confrontation Clause beyond the boundaries of precedent and common sense. The Confrontation Clause is a trial right, and should only be applied to proceedings at trial. As the section 9-102[2] hearing was not part of defendant's trial, she had no federal constitutional right to confront the children at that hearing. Any other result would warp the Confrontation Clause and prevent Maryland and other states[3] from accomplishing the goal of protecting abused children from our legal system.

A. Ritchie and Its Precedents.

The Confrontation Clause has a long and well-litigated history before this Court. One constant throughout this history is that the clause is essentialiy a *trial* right.

The plurality opinion in *Pennsylvania* v. *Ritchie*, 480 U. S. 39 (1987) provides the most direct statement that the Confrontation Clause is limited to the trial. Ritchie was charged with rape, involuntary deviate sexual intercourse, incest and

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2. Md. Cts. & Jud. Proc. Code Ann. § 9-102.

3. See *infra*, part II, at 19-25.

corruption of a minor. *Id.*, at 43. During pretrial discovery, Ritchie served a subpoena on Children and Youth Services (CYS), a state agency in charge of investigating child mistreatment and neglect cases. The subpoena sought access to CYS records concerning the victim, Ritchie's thirteen-year-old daughter. *Ibid.* CYS refused to comply with the subpoena, claiming that the records were privileged. *Ibid.* Ritchie moved to sanction the CYS and the trial court denied the motion, refusing to order the CYS to disclose the files. *Id.*, at 44.

Ritchie claimed "that the failure to disclose information that might have made cross-examination more effective undermines the Confrontation Clause's purpose of increasing the accuracy of the truth-finding process at trial." *Id.*, at 52. The Pennsylvania Supreme Court accepted Ritchie's claim, interpreting *Davis* v. *Alaska*, 415 U. S. 308 (1974) as holding that a privilege cannot be used to prevent defendant from obtaining information before the trial that might help defendant impeach or cross-examine a witness. *Ritchie*, *supra*, 480 U. S., at 52.

This Court reversed. A plurality[4] rejected the Pennsylvania Supreme Court's interpretation of *Davis*.

> "If we were to accept this broad interpretation of *Davis*, the effect would be to transform the Confrontation Clause into a constitutionally compelled rule of pretrial discovery. Nothing in the case law supports such a view. The opinions of this Court show that the right to confrontation is a *trial* right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination." *Ibid.* (emphasis in original).

4. Three justices disagreed with the plurality on whether the Confrontation Clause applied before the trial. *Id.*, at 61 (Blackmun, J., concurring in the judgment); *id.*, at 66 (Brennan, J., dissenting, joined by Marshall, J.). Two other justices did not address the Confrontation Clause issue, dissenting on the ground that the case should not have been before the court because it lacked finality. *Id.*, at 75 (Stevens, J., dissenting, joined by Brennan, Marshall, and Scalia, JJ.).

The Confrontation Clause protects two interests of criminal defendants, "the right physically to face those who testify against him, and the right to conduct cross-examination." *Id.*, at 51. The plurality recognized that "[n]ormally the right to confront one's accusers is satisfied if defense counsel receives wide latitude at trial to question witnesses." *Id.*, at 53.

The cross-examination protected by the Confrontation Clause is the cross-examination conducted by defendant at trial. While *Ritchie* did not concern a defendant's right to confront witnesses in a pre-trial hearing, the plurality clearly implies there is no such right. "The right of confrontation is exclusively a 'trial right' . . . . It does not . . . require the government to produce witnesses whose statements are not used at trial, or to produce the underlying information on which its witnesses base their testimony." *Ritchie*, 480 U. S., at 54, n. 10, quoting Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 71, 125-126 (1974). As the Confrontation Clause is only concerned with protecting the cross-examination of witnesses who testify at trial, the right to confrontation cannot extend to any pre-trial proceeding. See *Ritchie*, 480 U. S., at 53, n. 9.

The *Ritchie* plurality's view is supported by this Court's previous treatment of the Confrontation Clause. One of the earliest statements of the reasons behind the Confrontation Clause is found in *Mattox* v. *United States*, 156 U. S. 237 (1895). *Mattox* dealt with the question of whether the transcript of first-trial testimony of since-deceased witnesses was admissible at retrial. *Id.*, at 238. The Court rejected defendant's claim that admitting this testimony violated the Confrontation Clause. The *Mattox* court found that:

> "[t]he primary object of the constitutional provision in question [the Confrontation Clause] was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Id.*, at 242-243.

These protections which the Confrontation Clause affords defendant are exclusively the province of the trial. An affidavit or deposition can only be admitted against a criminal defendant to prove guilt if it is introduced at trial. The prosecution witness can only "stand face to face with the jury in order that they may look at him" at trial.

The principles of *Mattox* were reaffirmed in *Dowdell* v. *United States*, 221 U. S. 325 (1911). The *Dowdell* court analyzed the right to confrontation in the Philippine Bill of Rights, which was substantially the same as the Sixth Amendment's Confrontation Clause. *Id.*, at 329-330. In construing this provision, the court noted that:

> "[t]his provision . . . intends to secure to the accused in the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet him face to face at the trial, who give their testimony in his presence, and give to the accused the opportunity of cross-examination. It was intended to prevent the conviction of the accused upon depositions or *ex parte*, affidavits and particularly to preserve the right of the accused to test the recollection of the witnesses in the exercise of the right of cross-examination." *Id.*, at 330 (citing *Mattox*, 156 U. S., at 242).

Once again, this Court sees the right to confrontation as preventing improper activities from occurring at trial. As long

as the procedure does not involve taking testimony against the defendant, the Confrontation Clause cannot be invoked. Thus the *Dowdell* court ruled that the Philippine Supreme Court could take certificates from the trial judge, clerk and court reporter for the purpose of correcting the appellate record without violating the defendants' confrontation rights. Since no "additional testimony was taken against the accused . . . bearing upon their guilt or innocence" when the Philippine Supreme Court obtained the certificates, defendants' right to confrontation was unharmed. *Id.*, at 331-332.

More recent decisions also contain extensive analysis of the purpose and limits of the Confrontation Clause. The Confrontation Clause's basis in the trial can be seen in the greatly reduced importance this Court has placed on pretrial confrontation. In *Barber* v. *Page*, 390 U. S. 719 (1968) the primary evidence against defendant was the reading of the transcript of the preliminary hearing testimony of a witness who was incarcerated at a federal prison in another state at the time of the trial. *Id.*, at 720. The defendant did not cross-examine the witness at the preliminary hearing. The *Barber* court found that Barber's right to confrontation was violated as no showing of unavailability had been made. *Id.*, at 724-725. The court also noted that even if defendant had cross-examined the witness at the preliminary hearing, the Confrontation Clause still would be violated.

> "The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial. *Id.*, at 725.

This functional interpretation of what is required to satisfy the Confrontation Clause is equally applicable to the reach of

the Confrontation Clause. *Barber* holds that the Confrontation Clause is not satisfied by pretrial confrontation because defendant's interests in a pretrial hearing are less than his interests at trial. This difference of interests also justifies not applying the Confrontation Clause to the less important pretrial hearings.

The basis of the Confrontation Clause in the trial was shown when it was first applied to the states. The Confrontation Clause was made obligatory upon the states through the Fourteenth Amendment's Due Process Clause in *Pointer* v. *Texas*, 380 U. S. 400 (1965). Writing for the majority, Justice Black noted that in *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) the Sixth Amendment's right to counsel applied to the states on the ground that the right to counsel is fundamental to a fair trial. *Pointer*, 380 U. S., at 403. Justice Black then noted that in *Malloy* v. *Hogan*, 378 U. S. 1 (1964) the court had applied the Fifth Amendment's guarantee against self-incrimination to the states because it too was fundamental to a fair trial. *Ibid.* Justice Black then proceeded to apply the Confrontation Clause to the states, finding that it, like the right to counsel and the guarantee against self-incrimination, is fundamental to a fair trial. *Ibid.*

> "The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution. *Id.*, at 404.

Thus when the *Pointer* court affirms that "the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal," *id.*, at 405, this simply reaffirms the roots of the Confrontation Clause in the trial.

California v. *Green*, 399 U. S. 149 (1970) dealt with the relationship between the Confrontation Clause and exceptions

to the rule against hearsay. *Id.*, at 155. In deciding that it was constitutionally permissible to admit prior inconsistent statements as substantive evidence, *id.*, at 154-155, this Court looked to the reasons behind the right to confrontation. The core of the Confrontation Clause was the "literal right to 'confront' the witness at the time of trial." *Id.*, at 157. Quoting extensively from *Mattox* v. *United States*,[5] the court determined that the Confrontation Clause was designed to prevent the defendant from being convicted by depositions and affidavits, giving defendant the right to confront and cross-examine adverse witnesses at trial. *Green*, 399 U. S., at 157-158.

The *Green* court took a practical view of the Confrontation Clause.

> "This conclusion [that the Confrontation Clause was not violated] is supported by comparing the purposes of confrontation with the alleged dangers in admitting an out-of-court statement. Confrontation: (1) insures that the witness will give his statements under oath — thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth;' (3) permits the jury that is to decide defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility." *Id.*, at 158 (footnote omitted) (quoting 5 Wigmore § 1367).

These concerns deal with insuring the reliability of the trial. While these purposes would help any fact-finding proceeding, they refer to, and are intimately concerned with the most important fact-finding process in the criminal justice system — the trial.

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5. See *supra*, at 8.

The *Green* court was concerned with the historical purpose behind the right to confrontation — preventing conviction based upon depositions. Thus defendant is entitled to cross-examine and literally confront his accusers, but he is only entitled to do so at trial. As the trial is the only place defendant can be convicted of a crime, defendant has no constitutional right of confrontation outside the trial.

The last case in the line leading to *Ritchie* is *Ohio* v. *Roberts*, 448 U. S. 56 (1980). *Roberts* dealt with the introduction of the preliminary hearing testimony of a witness who did not testify at defendant's subsequent trial. *Id.*, at 58-59. The analysis of the relationship between the hearsay rule and the Confrontation Clause naturally delved into the purpose behind the Confrontation Clause, and once again identified its roots in the trial. "The Court has emphasized that the Confrontation Clause reflects a preference for face-to-face confrontation *at trial*." *Id.*, at 63 (italics added).

The *Roberts* court adopted the view of *Mattox* v. *United States*, 156 U. S. 237 (1895), that the Confrontation Clause was primarily concerned with providing the accused with the ability to test the witnesses against him in front of the jury. *Roberts*, 448 U. S., at 63-64. In commenting on how confrontation helped defendant cross-examine witnesses, the *Roberts* court noted that "[t]hese means of testing accuracy are so important that the absence of proper confrontation at trial 'calls into question the ultimate integrity of the fact-finding process.' " *Id.*, at 64, quoting *Chambers* v. *Mississippi*, 410 U. S. 284, 295 (1973) (additional quotation marks omitted).

This passage in *Roberts* provides the ultimate justification for the Confrontation Clause. Having the defendant confront his accusers at trial helps ensure that the truth will come out at trial. The right to confrontation enhances the truth-seeking function three ways: by cross-examination, by forcing the witness to make his accusations to the defendant's face and by

requiring the witness to testify under oath. *Roberts*, 448 U. S., at 63, n. 6.

> "On one level, the right to confront and cross-examine adverse witnesses contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails. To foster such a system, the Constitution provides certain safeguards to promote to the greatest possible degree society's interest in having the accused and accuser engage in an open and even contest in a public trial. The Confrontation Clause advances these goals by ensuring that convictions will not be based on the charges of unseen and unknown — and hence unchallengeable — individuals.
>
> "But the confrontation guarantee serves not only symbolic goals. The right to confront and to cross-examine witnesses is primarily a functional right that promotes reliability in criminal trials." *Lee* v. *Illinois*, 476 U. S. 530, 540 (1986).

The actions of the trial court in the present case do not threaten the interests protected by the Confrontation Clause. The victims did not testify at a hearing held to determine the propriety of televising their trial testimony over closed-circuit television. That hearing did not present any evidence to the fact-finder regarding the ultimate question of guilt or innocence. The section 9-102 hearing was held only to determine whether there was sufficient justification to use a particular means of presenting evidence.

While defendant's interests were adversely affected by the result of the section 9-102 hearing, adverse affect alone is not enough to invoke the Confrontation Clause. The hearing neither caused defendant to be subject to criminal sanction nor lessened the state's burden of proving its case. After the hearing, the state still had to go to trial, it still had to produce evidence and it still had to convince the jury beyond a reasonable doubt that defendant committed the charged crimes.

All the hearing accomplished was to allow the state to present the children's testimony at defendant's trial in a manner that prevented the child witness from seeing defendants when they testified. While this had some effect on defendant's ability to confront the children at trial, this is not enough to impose the Confrontation Clause on this pretrial hearing.

There are many instances where pretrial proceedings will be very important to the outcome of a criminal case. This Court, however, has declined to impose the Confrontation Clause on such proceedings. Thus in *Gerstein* v. *Pugh* 420 U. S. 103 (1975) this Court held that while the Fourth Amendment entitled a person to a judicial determination of probable cause for pretrial restraint of liberty, defendant was not entitled to confront and cross-examine witnesses at the hearing. *Id.*, at 120. This Court has also found no violation of the Confrontation Clause when an informant did not testify at a suppression hearing and the arresting officers refused to divulge the name of the informant. *McCray* v. *Illinois*, 386 U. S. 300, 312-313 (1967). Federal Rules of Criminal Procedure rule 5.1(a) freely allows the use of hearsay evidence in preliminary examinations despite the fact that as the Confrontation Clause generally forbids the use of hearsay at trial without some showing of the reliability of the testimony and the unavailability of the declarant. See *Roberts*, *supra*, 448 U. S., at 66. Finally, there is no right of confrontation at all in grand jury proceedings. See *Hannah* v. *Larche*, 363 U. S. 420, 449 (1960).

Determining whether a child can testify over closed-circuit television is no more important to defendant than determining probable cause under the Fourth Amendment for pretrial restraint of liberty, determining whether a piece of evidence is constitutionally admissible at trial or determining whether there is sufficient evidence to justify prosecution. The Confrontation Clause therefore is no more applicable to this hearing than it is to these other procedures.

B. Recent Cases.

In the last three years, this Court has decided two important cases on the relationship between procedures designed to protect the testifying victim in child abuse cases and the Confrontation Clause. These cases, *Kentucky* v. *Stincer*, 482 U. S. 730 (1987) and *Coy* v. *Iowa*, 487 U. S. ___, 101 L. Ed. 2d 857, 108 S. Ct. 2798 (1988), follow the line of reasoning started in *Mattox* v. *United States*, 156 U. S. 237 (1895) and continuing through *Pennsylvania* v. *Ritchie*, 480 U. S. 39 (1987) that the scope of Confrontation Clause is limited to the trial.

In *Stincer* defendant was excluded from a hearing to determine the competency of two child witnesses. Stincer claimed this violated his right to confrontation and due process. *Stincer*, 482 U. S., at 732. Stincer had been indicted for committing first-degree sodomy with an eight-year-old girl, a seven-year-old girl and a five-year-old boy. *Ibid.* After the jury was sworn, but before the evidence was presented, the trial court conducted a hearing in chambers to determine if the children were competent to testify. *Ibid.* Over defendant's objection, defendant was excluded from this hearing although his counsel did attend. *Id.*, at 732-733. The trial court found both children competent to testify. *Id.*, at 733. Each child testified at trial and defendant was convicted of first-degree sodomy. *Id.*, at 733. The Kentucky Supreme Court reversed Stincer's conviction, finding that his right to confrontation was violated when he was prevented from attending the competency hearing. *Id.*, at 734. This Court granted certiorari to examine the constitutionality of the trial court's actions.

This Court once again examined the purpose behind the Confrontation Clause. The *Stincer* court noted that cross-examination was a primary interest served by the Confrontation Clause, and that cross-examination "is critical for ensuring the integrity of the factfinding process." *Id.*, at 736. The court, quoting from *Mattox* v. *United States*, 156 U. S. 237

(1895)[6] recognized that the chief value of cross-examination was giving defendant a chance to test the prosecution's case in open court, thus preventing conviction by deposition or affidavit. *Stincer*, 482 U. S., at 736-737. Therefore "the right to confrontation is a functional one for the purpose of promoting reliability in a criminal trial." *Id.*, at 739.

The *Stincer* court found defendant's right to confrontation had not been violated. It found that in Kentucky, as in some other states, witness competency is not a jury question, but is the sole province of the judge. *Id.*, at 742. Furthermore, defendant had the opportunity to conduct a thorough cross-examination of the two children at trial. *Id.*, at 744. Therefore defendant had sufficient opportunity to confront the children. *Ibid.*

Stincer did not involve pretrial use of the Confrontation Clause. The competency hearing took place after the jury was sworn, *id.*, at 732, and the Kentucky Supreme Court felt that the hearing was a crucial part of Stincer's trial. *Id.*, at 744, n. 17. Thus this Court chose not to distinguish between trial and pretrial proceedings because in Kentucky the competency hearing could be a stage of the trial. *Id.*, at 739. Therefore *Stincer* does not contradict the view of the *Ritchie* plurality that there is no right to pretrial confrontation. *Id.*, at 738-739, n. 9.[7]

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6. See *supra*, at 8.

7. Justice Blackmun, the author of the *Stincer* opinion, disagreed with the *Ritchie* plurality's view that the Confrontation Clause did not apply before the trial. *Pennsylvania* v. *Ritchie*, 480 U. S. 39, 62 (1987) (Blackmun, J., concurring). This difference between Justice Blackmun and the *Ritchie* plurality, however, had no bearing on the case in *Stincer*. *Stincer*, 482 U. S., at 738, n. 9.

The reasoning behind *Stincer* supports limiting the Confrontation Clause to the presentation of evidence to the fact-finder at trial. The *Stincer* court envisioned a "functional" Confrontation Clause that is primarily concerned with defendant's ability to cross-examine witnesses at trial. *Id.*, at 737. The court wanted to keep the fact-finding process as reliable as possible and prevent defendants from being convicted on untested depositions or ex parte affidavits. *Id.*, at 736. These are the same interests and concerns raised by this Court in Confrontation Clause cases time and again, from *Mattox* to *Ritchie*.[8] Therefore *Stincer* is best seen as a continuation of the line of reasoning that ultimately supports limiting the scope of the Confrontation Clause to the trial.[9]

The most recent major case dealing with the Confrontation Clause was *Coy* v. *Iowa*, 487 U. S. ___, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988). *Coy*, like *Stincer* and *Ritchie* before it, also involved the testimony of the complaining witness in a child molestation prosecution. In *Coy*, defendant "was convicted of two counts of lascivious acts with a child after a jury trial in which a screen placed between him and the two complaining witnesses blocked him from their sight." 108 S. Ct., at 2799, 101 L. Ed. 2d, at 862.

The *Coy* court reversed the conviction on Confrontation Clause grounds. The *Coy* court found that while most Confrontation Clause cases were concerned with the admissibility of out-of-court statements or restrictions on the scope of cross-examination, 108 S. Ct., at 2800, 101 L. Ed. 2d, at 863-864, the Confrontation Clause also guaranteed defendant the

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8. See part I A, *supra*, at 5-15.

9. *Stincer* also addressed the due process right to be present. *Id.*, at 743-747. This issue is not raised in the present case as Craig was present throughout the pretrial hearing. See App., at 5.

right to "a face-to-face meeting with witnesses appearing before the trier of fact." 108 S. Ct., at 2800, 101 L. Ed. 2d, at 863-864. As there was no face-to-face encounter, and, as no specific finding had been made that the children needed protection, the Confrontation Clause was violated and Coy's conviction was reversed. 108 S. Ct., at 2803, 101 L. Ed. 2d, at 867.

Coy continued this Court's tradition of tying the Confrontation Clause to the trial. The *Coy* court realized that the primary concern behind the Confrontation Clause was preserving the integrity of the fact-finding process. 108 S. Ct., at 2802, 101 L. Ed. 2d, at 866. The *Coy* court saw "the face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.' " 108 S. Ct., at 2801, 101 L. Ed. 2d, at 865 quoting *Pointer* v. *Texas*, 380 U. S. 400, 404 (1965). Thus, as in previous cases, the right to confrontation in *Coy* is used to prevent unjust convictions. The proper place to check unfounded convictions is in the trial. The *Coy* court seemed to recognize this when it emphasized a particular part of a passage from *California* v. *Green*.

> "To hold that our determination of what implications are reasonable must take into account other important interests is not the same as holding that we can identify exceptions, in light of other important interests, to the irreducible literal meaning of the clause: 'a right to *meet face to face* all those who appear and give evidence *at trial*.' " 108 S. Ct., at 2803, 101 L. Ed. 2d, at 867, quoting *California* v. *Green*, 399 U. S. 149, 175 (1970) (Harlan, J., concurring) (emphasis added in *Coy*).

To the *Coy* court the "irreducible literal meaning" of the Confrontation Clause limited the scope of the right to confrontation to the trial. As *Coy* dealt with the interference of defendant's right to confront witnesses at trial, there was no need to make any distinction between trial and pretrial rights to confrontation. That the *Coy* court nonetheless indicated

that the literal right to confront was applied only to the trial demonstrates that the *Coy* court was aware of and agreed with the line of cases leading to the *Ritchie* plurality's finding that the Confrontation Clause did not extend to pretrial procedures.

The *Coy* majority explicitly reserved for another case whether "individualized findings" would support an exception to literal confrontation during the child's testimony. 108 S. Ct., at 2803, 101 L. Ed. 2d, at 867. The concurrence explicitly stated that a "case-specific finding of necessity" might provide the "compelling state interest" that would make "the strictures of the Confrontation Clause . . . give way." *Id.*, at 2805, 101 L. Ed. 2d, at 869-870 (O'Connor, J., concurring). The dissenting justices did not believe that a "case-by-case inquiry" was needed. *Id.*, at 2809, 101 L. Ed. 2d, at 875 (Blackmun, J., dissenting).

In none of the opinions in *Coy*, however, is there a hint of the second-order confrontation right found by the state court in the present case. There is no right to confront the witness at a hearing for the purpose of determining whether an exception exists to the usual right to confront the witness.

II. Applying the Confrontation Clause to pretrial hearings will prevent states from protecting abused child witnesses.

A. The Child's Ordeal.

In her concurring opinion in *Coy* v. *Iowa*, 487 U. S. ___, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988), Justice O'Connor, joined by Justice White, noted that a defendant's confrontation "rights are not absolute" but under certain circumstances, could be modified "so as to permit the use of certain procedural devices designed to shield a child from the trauma of

court-room testimony. " 108 S. Ct., at 2803, 101 L. Ed. 2d, at 868 (O'Connor, J., concurring). The concurrence recognized that child abuse is one of the greatest problems faced by society, and that the problems of the abused child may continue after the prosecution of the abuser commences. *Id.*, at 2803-2804, 101 L. Ed. 2d, at 868.

Many states recognize that prosecuting child abuse cases can harm the child and have enacted "a variety of ameliorative measures to help the child through the prosecution." *Coy, supra*, *Id.*, at 2804, 101 L. Ed. 2d, at 868 (O'Connor, J., concurring). Applying the Confrontation Clause to pretrial procedures would prevent the states from helping the children. If defendants have a pretrial right to confrontation, then the states will not be able to protect the abused child from certain harms without first subjecting the child to the harm the states seek to avoid.

Such an interpretation of the Confrontation Clause would be tragic for the child. The court would put the child on the stand, have him confronted and cross-examined by defendant and defense counsel. If the child holds up under the strain of confronting defendant, the child would not be entitled to having his trial televised. On the other hand, if the child is sufficiently hurt by his encounter with defendant then the child can receive the protection of televised testimony. Therefore in order to save the child you would first have to destroy him.[10]

Given the unpleasant options left to the child by the Maryland Court of Appeals, it is likely that the child would want to avoid using section 9-102. If he uses section 9-102 he is guaranteed at least one harrowing confrontation with defendant,

10. "It became necessary to destroy this town in order to save it." Attributed to an American officer firing on Ben Tre, Vietnam in the Vietnam War. J. Bartlett, Familiar Quotations 925 (15th ed. 1980).

or if the court feels that the child's experience was not painful enough, then the child would be forced to confront defendant *twice*, once at the pretrial hearing and again at trial. With these alternatives the sensible course would be to avoid using section 9-102, guaranteeing that child meets the defendant at trial but avoiding the risk of meeting defendant twice.

Requiring the child to be harmed by confronting defendant before taking steps to prevent such harm is similar to an archaic method of proof known as the water-ordeal.

> "Water-ordeal was performed either by plunging the bare arm up to the elbow in boiling water, and escaping unhurt thereby: or by casting the person suspected into a river or pond of cold water: and, if he floated therein without any action of swimming, it was deemed an evidence of his guilt; but, if he sunk, he was acquitted. It is easy to trace out the traditional relics of this water-ordeal, in the ignorant barbarity still practiced in many countries to discover witches, *by casting them into a pool of water, and drowning them to prove their innocence*." 4 W. Blackstone, *Commentaries* 337 (1769) (emphasis added).

Requiring the child to confront defendant before the trial is more accurate than the water-ordeal. To the child, however, the treatment must seem very similar. If no harm comes to him he is "guilty" and gets no relief; only if he suffers enough is the child "innocent" and entitled to relief.

This painful method of proof should not be enshrined into a Constitutional right. In the present case, extensive expert testimony was taken regarding the children's inability to confront defendant under normal trial conditions.[11] Defendant was present during the expert testimony and defense counsel

11. See *supra*, at 3.

was allowed to cross-examine these experts. Pet., at 5. The trial court found that the predicate showing of need had been made as to each child. Pet., at 8-9.

The expert testimony was more than sufficient to sustain the trial court's "individualized findings that these particular witnesses need special protection." *Coy*, *supra*, 108 S. Ct., at 2803, 101 L. Ed. 2d, at 867. States should be allowed to develop their own standards of proving need to satisfy *Coy*. "The circumstances of this case demonstrate again that neither the Constitution as originally drafted nor any amendment, nor indeed any need, dictates that we must have absolute uniformity in the criminal law in all the States." *California* v. *Green*, 399 U. S. 149, 171-172 (1970) (Burger, C. J., concurring).

The Confrontation Clause was meant to give defendant a chance to test the evidence used against him at trial. It was meant to prevent conviction by deposition like Sir Walter Raleigh's treason conviction.[12] The right to confrontation was not meant to turn every aspect of the criminal process into a mini-trial.

B. Other States.

The harm done by affirming the Maryland court's decision would not be limited to the state of Maryland. Many states have enacted statutes providing for televising the testimony of

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12. Sir Walter Raleigh was accused of treason by conspiring with Lord Cobham to make Arabella Stuart Queen of England. The case against Raleigh consisted of a confession of Cobham extracted by torture. Cobham subsequently repudiated his confession in a letter to Raleigh. At trial Raleigh demanded that Cobham be brought before him for questioning. The court refused as it realized that the confession would be repudiated. Raleigh was convicted and executed fifteen years later. Pollit, *The Right of Confrontation: Its History and Modern Dress* 8 J. Pub. L. 381, 388-389 (1959).

abused children.[13] Requiring the child to personally confront defendant at a pretrial hearing before letting the child testify over television prevents these statutes from accomplishing their goal of helping the child.

The state of New York recognizes that the child should not be forced to confront defendant at the pretrial hearing. New York provides for televising a child's testimony over closed-circuit television in section 65.30 of New York's Criminal Procedure Law. Section 65.20 of the Criminal Procedure Law prescribes the procedure for application and the grounds for determining whether a child's testimony should be televised. Subdivision 6 of section 65.20 states that "[n]otwithstanding any other provision of law, the child witness who is alleged to be vulnerable may not be compelled to testify at such hearing [held to determine whether the child's testimony should be televised] or submit to any psychological or psychiatric examination. The failure of the child witness to testify at such hearing shall not be a ground for denying a motion made pursuant to subdivision one of this section."

California takes an approach similar to New York's. California Penal Code section 1347(b) allows the child witness to testify over two-way .elevision if the trial court makes certain findings showing that the witness is otherwise unavailable and the equipment accurately conveys the image and demeanor of the witness. Subdivision (c)(2) provides that the child may not be compelled to testify at the hearing to determine whether to televise the child's testimony. Evidence Code section 240(c) provides that witnesses unavailability can be proven by expert testimony showing that the physical or mental trauma of the crime makes the victim incapable of testifying. Thus Evidence Code Section 240(c) permits the trial court to make its find-

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13. Twenty-six states have enacted such statutes. See Brief Amicus Curiae for National Association of Counsel for Children Appendix A 1a-2a.

ings under Penal Code section 1347 based solely on expert testimony. However, California does allow the trial court the discretion to question the child in chambers. Cal. Pen. Code § 1347(c)(3) (Deering 1990 Supp.). This questioning can only be done by the judge and must be done in chambers; defendant cannot be present during the questioning. The Maryland decision, if accepted by this Court, would throw a wrench into this carefully balanced procedure.

Indiana is another state whose procedure is threatened by the decision of the Maryland court. Section 35-37-4-8 of the Indiana Code allows the trial court to order that an abused child testify over closed-circuit television. The court cannot make this order without some justification. The justification can consist of a psychiatrist's certification "that the child's testifying in the courtroom would be a traumatic experience for the child," or a physician certifying "that the child cannot be present in the courtroom for medical reasons" or the introduction of evidence that allows the court to find "that it is more likely than not that the child's testifying in the courtroom would be a traumatic experience for the child." Ind. Code Ann. § 35-37-4-8(d)(1)(c)(i-iii) (West 1986). Indiana has provided a way to make the individualized finding of need required by the *Coy* court[14] without forcing the child to unnecessarily confront defendant. As either medical or psychiatric testimony can be sufficient to prove a child's need to have his trial testimony televised, the child does not necessarily have to testify to prove his need.

Mississippi has a statutory plan similar to Indiana's. Mississippi, like Indiana, provides the means for a trial court to determine that the child needs to have his trial testimony televised without forcing the child to testify at the pretrial hearing.

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14. See *supra*, at 19.

The trial court can order an abused child's testimony be televised if it makes a finding that, based upon certain behavioral indicators, "that there is a substantial likelihood that the child will suffer traumatic emotional or mental distress if compelled to testify in open court." Miss. Code Ann. § 13-1-405(1) (1989 Supp). Mississippi allows these behavioral indicators to be proven by child psychologists and child psychiatrists. *Id.*, § 13-1-411.

Other states are not as explicit in their desire to insulate the child from having to testify in any hearing regarding the televising of the child's trial testimony. While some states require courts to make certain findings[15] before allowing the child's trial testimony to be televised, many states have no standards. No statute, anywhere in the nation, requires the child to testify to prove his need to have his testimony televised.

The decision of Maryland's highest court, if accepted by this Court, would destroy the policy these states have set forth. They will no longer be able to insulate the child from the many harms of testifying. The very process they use to allow the testimony to be televised under *Coy* will be used to undermine the policy of minimizing the contacts between the abused child and his alleged abuser.

III. Two-way television raises no confrontation problem.

The Maryland Court of Appeal indicated that the trial court on remand should consider two-way television. *Craig* v. *State*, 560 A. 2d 1120, 1128 (1989). If retrial is necessary for

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15. See, *e.g.*, Alaska Stat. § 12.45.046(c) (1989 Supp.); Fla. Stat. Ann. § 92.54 (1), (West 1990 Supp.); Ohio Rev. Code Ann. § 2907.41(E) (Page 1987); N. J. Rev. Stat. § 2A:84A-32.4(b) (West 1990 Supp.).

any reason, see *id.*, at 1121, n. 3, this Court should clarify for guidance on retrial that two-way television raises no federal Confrontation Clause problem whatever. See *Coy* v. *Iowa*, 108 S. Ct. 2798, 2804, 101 L. Ed. 2d 857, 868 (1988) (O'Connor, J., concurring). The *Coy* court was concerned with the defendant's and the witness's inability to see each other. *Id.*, at 2802, 101 L. Ed. 2d, at 866. Two-way closed-circuit television, however, lets the witness "[l]ook [defendant] in the eye and say that." *Id.*, at 2801, 101 L. Ed. 2d, at 865. Thus a court would not need to make an individualized finding that a child needed protection to order televising a child's testimony over two-way closed-circuit television.

Several states only allow two-way closed-circuit television in the televised testimony statutes.[16] Other states do not differentiate between two-way and one-way closed-circuit television.[17] These and other states need assurance that the use of two-way closed-circuit television can be done without raising any Confrontation Clause issues.

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16. See Cal. Penal Code § 1347(b) (Deering 1990 Supp.); Haw. Rev. Stat. § 626-1:Rule 616(d) (1985); Vt. R. Evid. 807(e) & (f) (1989 Supp.).

17. See, *e.g.*, Ind. Code Ann. § 35-37-4-8(b)(1) (West 1986); Miss. Code. Ann. § 13-1-405(1) (1989 Supp.); N. J. Rev. Stat. § 2A:84A-32.4(a) (West 1990 Supp.).

Conclusion

The decision of Maryland Court of Appeals should be reversed.

Dated: February, 1990

Respectfully submitted,

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